

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

TIMOTHY W. ZEHR)	
Claimant)	
VS.)	
)	Docket No. 1,003,786
MAIN STREET DELI)	
Respondent)	
AND)	
)	
KANSAS RESTAURANT & HOSPITALITY ASSOCIATION SELF-INSURANCE FUND)	
Insurance Fund)	

ORDER

Claimant appealed the November 16, 2005, Award entered by Special Administrative Law Judge Marvin Appling. The Board heard oral argument on March 17, 2006, in Wichita, Kansas.

APPEARANCES

Roger A. Riedmiller of Wichita, Kansas, appeared for claimant. Jeffery R. Brewer of Wichita, Kansas, appeared for respondent and its insurance fund.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

This is a claim for a September 17, 2001, accident and resulting low back injury. In the November 16, 2005, Award, Judge Appling entered an award "not to exceed \$100,000 for a 100% work disability."¹

¹ ALJ Award (Nov. 16, 2005) at 3.

Claimant contends Judge Appling erred in computing his disability compensation. Claimant argues Judge Appling found claimant was “permanently and totally disabled”² but, nonetheless, limited his disability compensation to \$100,000. Claimant asserts the Judge should have awarded him permanent total disability benefits under K.S.A. 44-510c, which are subject to a higher limit, \$125,000. Accordingly, claimant requests the Board to grant him permanent total disability benefits and a maximum award of disability compensation in the sum of \$125,000.

Conversely, respondent and its insurance fund contend the Award should be affirmed.

The parties agree the only issue before the Board on this appeal is whether claimant is permanently and totally disabled. If not, the parties also agree the Judge appropriately awarded claimant \$100,000 in permanent partial general disability benefits.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties’ arguments, the Board finds and concludes:

Claimant is 47 years old and lives in Inman, Kansas. He is a high school graduate who has spent most of his career working as a baker, cook and kitchen manager. In addition, he has worked as a laborer for at least two different construction companies, a laborer for a tree nursery and landscaping company and as a fiberglass worker in a fiberglass shop.

Respondent, Main Street Deli, employed claimant as a baker. On September 17, 2001, claimant injured his low back lifting a bowl of bread dough. He immediately felt pain on his left side and the top of his buttocks and he promptly sought medical treatment.

As a result of his back injury, claimant underwent two low back surgeries. The first, which he underwent in November 2001, was a microdiscectomy between the fourth and fifth lumbar (L4-5) intervertebral levels. But due to continuing symptoms, claimant underwent a second low back surgery in November 2002 in which the surgeon redid the first procedure and also performed a complete L5 hemilaminectomy on the left and decompressed the nerve roots at the next lower level (L5-S1). In addition, in July 2003, claimant underwent a discography, which resulted in pain in his left testicle and his feet.

At least two doctors have suggested that claimant might require a spinal fusion.

At the time of the March 7, 2005, regular hearing, claimant complained of pain in his back, down his leg (including his calf and toes), in both feet (more on the left than the right),

² *Id.* at 3.

and in his hips. Claimant testified he would not be able to perform any of the jobs he held in the 15 years before his September 2001 accident. And all three doctors who testified agree.

After the accident, claimant received approximately two years of temporary total disability benefits. In November 2003, he attempted to train other bakers at respondent's deli but he found he was physically unable to do that. He tried again three or four more times but was unable to do that as it increased his symptoms.

Three doctors testified as to claimant's present condition and abilities. Neurosurgeon Paul S. Stein, M.D., who provided claimant with conservative medical treatment, last saw claimant in March 2003. Dr. Stein indicated claimant retained the ability to perform sedentary work that allowed him to occasionally get up and stretch and move around a minute or two. Nonetheless, the doctor testified he thinks it probably would be exceedingly difficult for claimant to find employment under these circumstances considering his education and work history.³

After considering a list of 84 former work tasks prepared by labor market expert Jerry D. Hardin, Dr. Stein concluded claimant retained the ability to perform only 23 of those tasks *assuming* those tasks would not violate his restriction against standing. According to Dr. Stein, claimant should not lift more than 30 pounds occasionally, not lift more than 15 pounds frequently, avoid repetitive bending and twisting, and avoid standing more than 30 minutes at a time or more than four hours of an eight-hour workday. And it is important to note it does not appear that Dr. Stein saw claimant after he underwent the July 2003 discography, which exacerbated his symptoms.

Dr. Philip R. Mills, who examined claimant twice and last saw him in early February 2005, testified claimant could work as long as he lifted using good body mechanics, lifted only between his waist and chest, avoided forward flexion and squatting, and changed positions as needed. After reviewing Mr. Hardin's task list, the doctor concluded claimant had lost the ability to perform 68 of the 84 former work tasks.

Finally, Dr. P. Brent Koprivica, who was claimant's medical expert, testified he believed claimant had lost the ability to perform all but approximately four of his former work tasks and that he was essentially unemployable. According to Dr. Koprivica, claimant should be limited to sedentary activities and, furthermore, be restricted from frequent and constant bending at the waist, and pushing, pulling, and twisting. Also, the doctor believes claimant should avoid placing his low back in sustained awkward positions and that he should not sit, stand, or walk more than 30 minutes at a time. Moreover, Dr. Koprivica believes claimant will need to lie down to manage his pain.

³ Stein Depo. at 29.

Both Dr. Stein and Dr. Mills determined claimant sustained a 10 percent whole person functional impairment as measured by the AMA *Guides*⁴ (4th ed.). But Dr. Koprivica, who also used the same *Guides*, determined claimant sustained a 25 percent whole person functional impairment. Considering the doctors' opinions, the Board is persuaded that claimant has sustained a 10 percent whole person functional impairment.

Due to his back injury, claimant has sustained a significant disability. The evidence is uncontradicted that he is unable to perform any of the jobs that he performed in the 15 years before his September 2001 accident. And the evidence is overwhelming that without training claimant is essentially unemployable. Conversely, with training, claimant may be able to return to work performing sedentary activities. Consequently, the Board finds claimant is entitled to receive permanent total disability benefits as provided by K.S.A. 44-510c. Accordingly, the November 16, 2005, Award should be modified.

Should claimant's ability to work be restored either by training or the body's natural healing process, the parties may apply for review and modification under K.S.A. 44-528.

The dissent below has raised the question whether the Special Administrative Law Judge was assigned to issue an award in this claim. Nonetheless, because the parties do not question Judge Applig's jurisdiction nor object to the procedure employed by the Director in assigning this matter to him, nor object to the lack of advance notice of that assignment, the Board sees no prejudice to have resulted and in this instance chooses not to raise these issues on its own motion.

AWARD

WHEREFORE, the Board modifies the November 16, 2005, Award entered by Judge Applig to award claimant permanent total disability benefits.

Timothy W. Zehr is granted compensation from Main Street Deli and its insurance fund for a September 17, 2001, accident and resulting disability. Based upon an average weekly wage of \$587.82, Mr. Zehr is entitled to receive 102.86 weeks of temporary total disability benefits at \$391.90 per week, or \$40,310.83, plus 216.10 weeks of permanent total disability benefits at \$391.90 per week, or \$84,689.17, for a permanent total disability and a total award not to exceed \$125,000.

As of April 25, 2006, Mr. Zehr is entitled to receive 102.86 weeks of temporary total disability compensation at \$391.90 per week in the sum of \$40,310.83, plus 137.29 weeks of permanent total disability compensation at \$391.90 per week in the sum of \$53,803.95, for a total due and owing of \$94,114.78, which is ordered paid in one lump sum less any

⁴ American Medical Association, *Guides to the Evaluation of Permanent Impairment*.

amounts previously paid. Thereafter, the remaining balance of \$30,885.22 shall be paid at \$391.90 per week until paid or until further order of the Director.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of April, 2006.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

The undersigned Board Member hereby adopts the majority opinion set forth in *Cervantes v. Safelite Glass Corporation*, No. 1,012,477 (Kan. WCAB April 2006). Highly summarized, the undersigned believes the Board lacks jurisdiction to hear appeals of any Awards issued by Special Administrative Law Judges when there is no documentary evidence contained within the file to substantiate that individual's authority to decide the matter. Accordingly, I would set aside the Award and remand the matter to the ALJ for an immediate determination on the merits.

BOARD MEMBER

c: Roger A. Riedmiller, Attorney for Claimant
Jeffery R. Brewer, Attorney for Respondent and its Insurance Fund
Marvin Appling, Special Administrative Law Judge
Thomas Klein, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director